

No. 16186

United States Court of Appeals
For the Ninth Circuit

AMERICAN MAIL LINE, LTD., a Corporation, *Appellant*,
vs.

TOKYO MARINE & FIRE INS. CO., LTD., a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

APPELLEE'S BRIEF

EVANS, McLAREN, LANE, POWELL & BEEKS
W. T. BEEKS

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1111 Dexter Horton Building,
Seattle 4, Washington.

Proctors for Appellee.

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JURISDICTION

Appellee agrees that the District Court had jurisdiction of the libel and cross-libel and that this Court has jurisdiction of this appeal.

COUNTER-STATEMENT OF THE CASE

Proceedings in the District Court

Appellee (libelant below) filed its cargo libel in admiralty *in personam* to recover damages for non-delivery of a portion of a shipment of barley loaded aboard the SS OREGON MAIL, owned and operated by appellant American Mail Line, Ltd. (herein sometimes called "the carrier") under the terms of its Bill of Lading VW-1-S, for carriage from Vancouver, Washington, to Shimizu, Japan (Libel, Tr. 3).

The appellant's answer alleged that the barley was not carried to destination by reason of having been

burned, charred and smoke damaged by fire caused by the burning of an electric flood light in the port after corner of the No. 1 lower hold of the vessel, and further alleged that the fire was caused without any fault or privity on its part, and claimed the immunity of the fire section of the United States Carriage of Goods by Sea Act, 1936 (COGSA), Section 4(2)(b) (46 U.S.C. 1304(2)(b)).

The carrier further alleged that if the loss and damage to the shipment was caused by fault or negligence of the carrier, such negligence was fault or error in the navigation or management of the vessel, for which it was excused under Section 4(2)(a) of COGSA (46 U.S.C. § 1304(2)(a) (Answer, Par. VIII and IX, Tr. 8-10)).

It further claimed a set-off, and cross-libelled, for General Average contribution in an amount to be determined by the General Average adjustment (Answer, Par. X, and Cross-Libel, Tr. 10-13). Appellee's Answer to the Cross-Libel denied the carrier's right to General Average contribution (Tr. 15-17).

Prior to trial, the parties stipulated to the quantity and value of the damaged and undelivered barley, and the carrier paid to appellee a portion of the proceeds of sale of barley salvaged from the shipment (Pre-Trial Stipulation, Tr. 18-20).

The case was tried on the following factual issues raised by the Answer and Cross-Libel:

1. Was the barley in question damaged by "fire"?
2. If so, was such damage caused by the actual fault or privity of the carrier?

3. Did the damage to the barley result from error in navigation or management of the vessel, or in the care and custody of the barley?

The trial court decided the first issue by finding and concluding that the barley was damaged by fire (Finding XII, Tr. 29, Oral Opinion, incorporated in Finding XVI, Tr. 20-23; Conclusion III, Tr. 33).

The trial court determined the second issue by finding and concluding that the carrier, through its Port Captain, Greenwood, was negligent, and at fault and in privity, in delaying for an unreasonably long time in acting for the protection of the shipment of barley, and that such negligence was a proximate cause of the damage to the barley (Finding XIII, Tr. 30-31, Oral Opinion, Finding XVI, Tr. 20-23; Conclusion III, Tr. 33).

The trial court decided the third question by finding and concluding that the officers and crew of the SS OREGON MAIL were negligent in the care and custody of the cargo in respect to the burning and use of the cargo lights in the No. 1 lower hold (Finding XII, Tr. 29-30; Conclusion IV, Tr. 34).

The trial court entered its decree awarding appellee its damages in full, and denied the appellant's claim for General Average contribution (Tr. 35-37).

The carrier appealed and assigns as error in this Court: the finding that it was negligent and at fault and in privity, in delaying for an unreasonably long time in the application of CO₂ (Specification of Error No. 2, Br. 16); the conclusion that the carrier is liable for damages resulting from its negligence and fault in

the protection of cargo, after commencement of a fire caused by negligence of the ship's officers and crew (Specification of Error No. 1, Br. 16); and denial of its claim for General Average, and special charges in connection with salvage of the barley (Specifications of Error 3, 4, Br. 16, 17).

Appellee was not aggrieved by the Decree below and does not appeal therefrom, but has filed a Statement of Points (Tr. 306), and assigns as error the trial court's finding that the barley was damaged by fire, rather than heat.

In this posture of the case appellee submits that if the Court sustains the finding and conclusion of the trial court that the carrier was at fault and in privity, and that its negligence was a proximate cause of damage to the barley, for which it is liable, the Court need not consider appellee's Specification of Error.

If the Court, however, overrules the trial court on the issues raised by the carrier's appeal, then it must consider appellee's contention that damage to the shipment of barley was not caused by fire, but by heat, and if it overrules the court below on that issue, this Court must affirm the decree, because the trial court found, in appellee's favor and against the carrier, that the damage resulted from negligence in the care and custody of the cargo, for which the carrier is not excused under COGSA, and appellant has assigned no error to that finding and conclusion.

Introduction to the Evidence

In its Statement of the Case, appellant's brief ignores the trial court's findings on important points, to

which it has assigned no error, emphasizes evidence which the trial court obviously rejected, and seeks to minimize or gloss over the testimony which the court accepted as the basis for its determination that the carrier was negligent in delaying unreasonably before acting after the OREGON MAIL arrived at Seattle on August 21, 1955.

Appellee will therefore restate the evidence which supports that finding, and review the evidence which bears on the issues of whether the barley was damaged by fire, or by heat, and whether the carrier exercised due diligence to make the vessel seaworthy.

Information Available on the Ship on August 21, 1955

The barley was loaded in bulk at Vancouver, Washington, on August 17, 1955 (Finding III, Tr. 24; Tr. 130). A portion was loaded into the No. 5 hatch, but is not involved in this case. The remainder was loaded into No. 1 hatch, filling the No. 1 lower hold and a part of the lower 'tween deck (Tr. 130, 133). The vessel then proceeded to Longview, Washington, where lumber was loaded into the No. 1 lower 'tween deck (Tr. 135-6). After departing from Longview, the vessel arrived at Vancouver, British Columbia, at 11:38 A.M., August 20. There it loaded general cargo, including cargo for the No. 1 hold (Tr. 138, 139).

At 6:00 P.M., August 20, while the vessel was at Vancouver, B.C., the Second Officer, Norman L. Tomlin, observed smoke in the Rich audio smoke detector cabinet in the bridge, or wheelhouse, and determined that the smoke was coming from the No. 1 lower hold. He notified the Chief Mate, Rodney Palmer, and the

Master, Captain Wilmarth (Tr. 46, 47). Palmer and Wilmarth inspected the smoke detector cabinet in Tomlin's presence, and smoke was visible at that time (Tr. 67).

Tomlin and Palmer then made an inspection of all accessible spaces on the vessel (Tr. 143). Tomlin took the precaution of closing the dampers on the ventilation system for the No. 1 hold, which were located on the king post (Tr. 47). Palmer entered the No. 1 resistor house, and learned that the switches for the cargo lights in No. 1 hatch were on, and the fuses for those circuits were in place (Tr. 146-147).

The Master ordered a continuous or frequent watch maintained on the smoke detector cabinet (Tr. 111). The vessel sailed from Vancouver, B.C., at 10:25 P.M., August 20. During that night, there was "a slight change, increase in the smoke" (Tr. 48).

The vessel arrived in Seattle at 6:57 A.M., August 21. A further examination of the vessel was made, and Palmer found smoke coming from the exhaust vent on the No. 1 king post (Tr. 146). The smoke was grayish, of a light to moderate density (Tr. 150). This exhaust vent serves only the three compartments of the No. 1 hold. A visual examination of the upper and lower 'tween decks disclosed no evidence of fire.

The observation of smoke at the exhaust vent was reported to Captain Wilmarth (Tr. 77).

Appellant's brief (pp. 7-9) asks this Court to ignore the foregoing evidence as to the information which the ship's officers obtained between 6:00 P.M., August 20,

and 9:00 A.M., August 21, and accept instead the testimony of Captain Wilmarth that an odor, rather than smoke, was reported to him, and that the first report of smoke he received was on the morning of August 21, and that he himself saw no smoke on August 20, or 21 (Appellant's Brief, 6-9).

Unfortunately for appellant, the trial court rejected this testimony of Captain Wilmarth and found the facts as follows:

(1) On the evening of August 20, smoke was observed in the smoke detector, coming from the No. 1 lower hold;

(2) A suspicious odor was detected in the area in which the air from the smoke detector was exhausted;

(3) The switches controlling the cargo lights for the No. 1 hold were on, and the fuses in place;

(4) An inspection of the vessel was made and no indication of any heat, smoke, odor, or fire was discovered in relation to any compartment except the No. 1 lower hold.

(Finding VIII, Tr. 27-28)

(5) On the morning of August 21, the appearance of smoke in the detector cabinet continued, and the odor of smoke was more pronounced:

(6) Smoke was reported coming from the No. 1 king post exhaust vent.

(Finding IX, Tr. 28).

In all probability, the trial court relied little on Wilmarth's testimony as to events of the 20th and the morning of the 21st, because it knew that three weeks prior to

trial Wilmarth was unable, even with the assistance of the ship's log, to recall that he had been aboard the vessel as Master prior to the morning of August 21 (Tr. 105-106).

Appellant also places some reliance on two entries made by Palmer in the log, Ex. A-1, bearing the times 1800, August 20, and "Note 0900," August 21. Aside from the fact that the entries are questionable on their face, being out of time sequence, each of them was contradicted by Palmer himself in some respect. Contrary to the entry on August 20, Palmer testified that Tomlin reported smoke (not odor) in the smoke detector, at 6:00 P.M., August 20 (Tr. 142). Contrary to the entry of August 21, he himself found grayish smoke of light to moderate density (not odor) at the king post exhaust vent on the morning of August 21 (Tr. 150).

No error is or could be assigned by appellant to the six evidentiary findings set forth above, based as they were on the testimony of ship's officers, called by the appellant, and much of it given during direct examination.

In any event, Wilmarth's telephone report to Greenwood, the carrier's Port Captain, at 9:00 A.M., August 21, shortly after the vessel's arrival in the carrier's home port, reveals more than his testimony at the trial, as to the knowledge Wilmarth had at that time. He told Greenwood:

"We have all the indications of a fire in number one lower hold." (Tr. 116)

Greenwood's Investigation

Greenwood testified that he was called by Wilmarth shortly after 8:00 A.M., August 21. He called Mr. James Gow to attend for American Mail Line because it was his immediate reaction to call for a surveyor experienced in giving him information and looking after the carrier's interests (Tr. 223).

Greenwood and Gow arrived at the vessel at 11:50 A.M. and 11:55 A.M., respectively, that morning (Ex. A-1, August 21).

The observations which Greenwood and Gow made, and the information which they obtained, were in startling contrast to the facts known to the ship's officers.

They went into the pilothouse, and observed an odor which in their opinion was stronger in the area of the smoke detecting system (Tr. 177). (Wilmarth testified that the air entering the smoke detector cabinet was exhausted onto the wing of the bridge and did not enter the wheelhouse. He could not recall that he ever smelled the odor in the wheelhouse (Tr. 107-110)).

Gow could not determine what the odor was, although in his opinion it had a smoke taint, but it was not heavily pronounced (Tr. 177). Close observation of the smoke detector cabinet satisfied Gow that the taint or odor was coming from the cabinet. He could not determine which compartment it was coming from, although he felt there was a slight indication that it was more pronounced from the No. 1 hold (Tr. 178). On cross-examination, however, he conceded that the smoke detector was concentrated on the suction line from the No. 1 hold, and that he was then satisfied that the odor

came from the No. 1 lower hold (Tr. 214-215). Gow made no personal inspection at the king post exhaust vent, but it was reported to him that an odor was detected there (Tr. 214). He did not question any of the ship's officers as to whether they had observed smoke prior to that time, because it wasn't necessary. He had been called down to observe the smoke detector cabinet, and if there had been smoke prior to that time, they would have said so, and he would have seen it himself (Tr. 216). He could suggest no condition, other than heating of the barley cargo, which could have caused the odor which was observed (Tr. 215).

Greenwood testified Captain Wilmarth's telephone report to him was of a suspicious odor (Tr. 223; cf. Wilmarth, Tr. 116). On direct examination he was not questioned about specific conditions aboard the vessel on August 21 (Tr. 222-223).

On cross-examination, he stated that he asked Wilmarth and Palmer how long the odor had been present (Tr. 229). All they would volunteer was that this odor was present (Tr. 230). Although smoke in the smoke detector cabinet had been reported to Wilmarth and Palmer by Tomlin, and was visible in the cabinet when they inspected it in Tomlin's presence (Tr. 46, 66-67, 142), and Palmer had observed smoke at the king post exhaust vent (Tr. 146, 150) and reported it to Wilmarth (Tr. 77), to the best of Greenwood's knowledge, they denied that smoke had been observed (Tr. 230).

At trial he testified that on the morning of August 21, he inquired about the cargo lights, and learned that the fuses had been discovered in place on the evening of

August 20. When his deposition was taken three weeks prior to trial, he could not recall whether that information had come out on that particular day, or somewhere along the line, and he based his testimony at trial on his feeling that one of his first questions would be whether the cargo lights were turned out (Tr. 231-232). Greenwood did not know whether he conveyed the information about the cargo lights to Gow (Tr. 232). Greenwood knew that cargo lights could cause a fire in grain or other cargos (Tr. 233). Before leaving the vessel on August 21, Greenwood determined that the vessel would continue to load cargo, including cargo to the No. 1 hold, but a continuous watch was to be maintained on the smoke detector apparatus (Finding IX, Tr. 28-29). Greenwood could have directed that loading be discontinued (Tr. 236-237).

Conclusions Reached on August 22

Greenwood and Gow returned to the OREGON MAIL, which had then shifted to Pier 88, Seattle, the following day, August 22.

Gow detected a more pronounced condition at the smoke detecting cabinet. The air sample coming from the No. 1 hold was darker or heavier than the air samples from other spaces. He saw no smoke at the king post exhaust vent, but he sent his assistant up to the vent. As a result of the observations made by himself and his assistant (who was not called as a witness), Gow, Greenwood and Wilmarth were convinced there was a fire in the No. 1 lower hold (Tr. 181-182).

The decision to apply CO₂ was based on the smoke

particles or samples from the No. 1 lower hold, and the condition at the exhaust ventilator.

Damage by Heat or Fire

The trial court found and concluded:

“From the condition and scorched, fire-burned appearance of libelant’s Exhibit No. 2, from the long continuing emanations of smoke and the registration of smoke on the detection apparatus, beginning August 20, 1955, and from the great amount of heat in the crackling barley taken in buckets out of the hold on August 25, 1955, that there was a fire in the barley cargo, which fire existed from the time smoke was first observed on August 20, 1955.” (Finding of Fact XII, Tr. 29-30, Court’s Oral Opinion, Finding of Fact XVI, Tr. 20-23)

We turn now to the evidence adduced, and upon which the court relied, in finding that the damage to the barley was caused by fire, not heat as appellee contended.

There is no evidence in the record that a flame or glow was observed in the barley by any person at any time.

It is conceded, of course, that the damaged barley was not subject to visual inspection prior to the application of CO₂.

The No. 1 hold was inspected, however, by Palmer, who entered the hold at 10:10 A.M., 1:50 P.M. and 2:15 P.M., August 25, in the course of discharge of the barley (Ex. A-1, August 25). At 2:15 P.M. he took with him a small hose, with which he applied water to the area, from a position where he was surrounded by barley, and there observed no flame or light (Tr. 278-284).

Under the testimony of appellant's witness Gow, application of CO₂ alone does not extinguish a fire but merely shuts off the supply of oxygen, and when oxygen again becomes available "that glowing mass will come right back up again either to a heavier glow or to an actual fire" (Tr. 208-209). Thus, under appellant's own evidence, if the barley had been afire prior to the application of CO₂, when oxygen again became available to it shortly prior to the time Palmer entered the hold at 2:15 P.M. on August 25th, the barley would have come back to a glow or flame but it was Palmer's testimony that it did not do so.

In the absence of direct testimony of the existence of a flame or glow, the court below relied on the condition of the barley itself, and testimony concerning emanations of smoke, noise and heat from the barley.

We must first consider the sample of scorched barley itself, upon its own observation of which the trial court relied heavily in support of its finding that the damage was caused by fire. Appellee introduced into evidence its Exhibit 2, a sample of charred barley delivered to appellee's representatives by appellant's surveyor, Gow. Gow, who was present during the discharge of the damaged barley from the hold of the OREGON MAIL on August 25, testified that there was no barley which he observed aboard the vessel which was more heavily charred or damaged than the sample which he preserved and a part of which was delivered to appellee and introduced in evidence as its Exhibit 2 (Tr. 206-207, 239, 241). (A similar quantity of the damaged barley was delivered to Laucks Laboratory, on behalf of the

appellant, but appellant introduced no evidence relating to this sample.)

With reference to the appearance of the barley, upon which the trial court relied, and which is available for inspection by this Court, appellee's witness, Charles V. Smith, a chemical engineer and partner in a Seattle commercial testing laboratory since 1946, testified, based upon experiments which he performed involving the application of heat to No. 2 two-rowed Western barley, the precise barley involved in this case, that the normal moisture content of the barley is driven off into water vapor at a temperature of 212° Fahrenheit; that the barley browns in the vicinity of 400°; that at 500° the barley gives off the parched odor of overcooked cereal; that at 550° there is a blackening and destructive distillation of the chemical structure of the barley in which acrid fumes are given off and the smell of burned rags or cereal is manifest; that charring begins at about 500° or 550° Fahrenheit and is thorough when the barley reaches 800°. He pointed out that commercial production of charcoal is accomplished at temperatures in the range of 550° to 800°. He further testified that a temperature of 1200° would be necessary to produce a color which would "just be visible" in any solid material (Tr. 246-247, 245, Ex. 3).

Smith testified that during an experiment in which he placed No. 2 two-rowed Western barley in an oven at a temperature of 600° Fahrenheit for a period of twenty minutes, he produced charring and chunking of the barley (Tr. 249). This barley was introduced into evidence as Libellant's Exhibit 4. The highest tempera-

ture attained in the barley itself during this experiment was a temperature of 685° (Tr. 249-250).

Based upon this experiment, the absence of ash, and the tarry appearance of Exhibit 2, and the identical condition of Exhibit 4, the controlled barley which reached only 685°, it was Smith's opinion that the barley damaged aboard the OREGON MAIL had not degenerated as a result of flame or glow and had never been subjected to a temperature in excess of 800° (Tr. 250-253).

Appellant presented no conflicting scientific testimony.

Appellant did, however, present certain other testimony in an attempt to support its contention that the barley was damaged by fire. This evidence may be summarized as follows:

1. The testimony of Second Mate Tomlin as to the condition and appearance of the electrical cable leading to the cargo light on the port side, aft of the square of the hatch in the No. 1 lower hold. Tomlin testified that cable was blackened and stiff and charred, and the paint on the overhead was blackened and charred, but not blistered (Tr. 54-56). He was not able to describe too well the various conditions in and about the lights, the cable and the overhead at that time (Tr. 57).

Tomlin stated that he had, on one prior unidentified occasion, observed the effect of fire on electrical cable similar to the cable in the No. 1 lower hold, that based on that experience he was able to state that the condition of burned armored electrical cable such as was in this hold, differed in appearance and feel "from the

same cable in ordinary condition" (Tr. 60), and that there was "not much" difference between the cable he had felt on that other occasion and the cable in the No. 1 lower hold of the OREGON MAIL (Tr. 62). On the basis of that observation and feeling of the cable, it was his opinion or conclusion "that there had been a fire around the lights in the hatch." Tomlin had had no particular educational background in the field of physics or chemistry (Tr. 57, 58).

2. Captain Wilmarth testified that following the discharge of the damaged barley, he personally went into the hold and observed the cargo light and the physical condition of the after part of the No. 1 lower hold. The paint work was scorched and discolored, and the cargo light was blackened (Tr. 91).

Captain Wilmarth had previously observed "small fires on various vessels that I've been in, paint locker fires and galley," and observed the metal surfaces where such fires occurred (Tr. 92-93). On the basis of his examination of the overhead in the No. 1 lower hold, his conclusion was that there had been a fire in that area, but he was unable to judge the intensity of the heat or fire (Tr. 102-103).

Wilmarth's definition of "fire" did not necessarily include the notion of visible flame to his mind, although it usually did (Tr. 120). On the other occasions to which he testified, when he had observed the effect of fire on other vessels, he had seen flame and that was what had indicated the existence of a fire to him on those occasions (Tr. 121). He did know, however, that painted metal surfaces could become scorched or blackened by

heat in the absence of flame (Tr. 121). In fact, he had observed conditions similar to those in the No. 1 lower hold which he knew to have been produced by heat in the absence of flame (Tr. 122).

3. The testimony of Palmer as to the appearance of the electrical cable and general condition of the No. 1 lower hold was similar to the testimony of Tomlin and Wilmarth (Tr. 155-157) but he was not asked to state his conclusion as to whether a fire had occurred.

4. The testimony of appellant's surveyor, Gow. Gow heard a definite crackling in the barley behind the lower hold hatch coaming, when he went into the No. 1 lower hold (Tr. 194-195), on August 25 (Tr. 201). Very light smoke was coming from the barley, but he observed no flame or glow then or at any other time (Tr. 195, 202-203). Thereafter, he recommended that water be sprayed on the barley behind the coaming, by the ship's officers (Tr. 196). From the heavily charred and burned condition of the barley, Gow formed the conclusion that it had been on fire (Tr. 200).

Gow did not know what effect a temperature sufficient to sustain a glow or flame would have on barley (Tr. 203), although his definition of fire necessarily involved a condition of flame or glow (Tr. 202). He supposed that flame or glow would necessarily reduce some of the components of the barley to ash (Tr. 204). At the trial he first stated that in the samples of barley that he removed from the hold he "observed what would appear to be ash" (Tr. 204). At the time his deposition was taken on April 16, 1958, however, in answer to the question "Did you observe any barley which was re-

duced to ash," his answer was "No" and to the question "Did you observe any ash?", his answer was "No, sir." He had no knowledge at the time of trial that he did not have at the time of his deposition (Tr. 204-205). Ultimately, at the trial, in answer to the question: "Did you see actual ash?" Gow's answer was: "No, I didn't see actual ash" (Tr. 206).

Gow knew that heat would damage grain cargo. In fact, he could suggest no other condition which might have caused the odor which he detected coming from the No. 1 lower hold on the morning of August 21 (Tr. 214-215). He did not know at what temperature barley would crackle, and he did not know what temperature the barley reached at any time (Tr. 209-210).

5. Several witnesses testified that there was a crackling noise in the barley on August 25, and that when a bucket of barley was brought up on deck alongside the No. 1 hatch on that date, the bucket was extremely hot, and the barley was smoking and crackling (Wilmarth, Tr. 92; Greenwood, Tr. 226; Gow, Tr. 195). There was no testimony as to the temperature of the barley or the bucket and no testimony that the barley showed flame or glow. There was no testimony other than that of Gow, concerning the significance of the crackling noise. Gow's survey report had stated: "Air filtering thru and diffusing the CO₂ caused scorched and blackened grain to crackle." That was his opinion as to the cause of the crackling, at the time of trial (Tr. 209).

Finally, with reference to the issue of whether or not there was a fire, it is pertinent that appellant failed to call Seattle Fire Chief Kennedy, who was on board the

OREGON MAIL, on August 22nd and 23rd (Ex. A-1, 2230 August 22; 1930 August 23) or Fire Chief Graham, who was on board on August 23rd and August 25th (Ex. A-1, 0905 August 23; 1610 August 25) or the officers of the United States Coast Guard who were aboard August 23 and 25 (Ex. A-1 0920, August 23; 1430 August 25). It did not produce evidence of a scientific character concerning the sample of the most severely damaged barley which was and had been in its possession or that of its representatives since the date of the fire (Tr. 206-207, 216-217).

Due Diligence to Make the *Oregon Mail* Seaworthy

Finding the carrier in privity and at fault for the loss and damage to the barley, the trial court was not required to find whether the carrier had exercised due diligence to make the vessel seaworthy in passing on its Cross-Libel for General Average contribution.

The trial court's findings do, however, indicate that it rejected the carrier's testimony that the fuses had been removed from the circuits for the cargo lights in No. 1 lower hold. The carrier contended that these fuses were removed in the early morning of August 17, the day the barley was loaded (Testimony of 2d Electrician McLeod, Tr. 164). The court found, however:

“ * * * Said fixed electric cargo lights in the No. 1 lower hold were improperly and negligently turned on or permitted to remain burning after the loading of bulk barley into the No. 1 lower hold of the SS OREGON MAIL had commenced, by the negligent act or omission of the ship's officers and crew.” (Finding VII, Tr. 27)

Appellant assigns no error to that finding. McLeod's

testimony did not compel a finding that the fuses had been removed from this circuit on August 17, because he further testified that there were errors in the index cards on the doors of the switch panels on the OREGON MAIL, and he could not testify whether they were corrected before or after this casualty (Tr. 166-169). Appellant asks the court to infer from the testimony of Night Mate Hardie that the fuses were replaced during cargo operations at Longview, but Hardie did not so testify (Tr. 257-277) and appellant did not produce or explain the non-production of the stevedore foreman and the ship's electrician who would have had knowledge of the replacement of the fuses, if they were replaced at that time.

The general practice in the American merchant marine is to remove fuses from the circuits for cargo lights in grain compartments to eliminate the fire hazard (Tr. 44). Such removal is good seamanship and standard practice (Tr. 232-233).

SPECIFICATION OF ERROR

The District Court erred in finding and concluding "that there was a fire in the barley cargo, which fire existed from the time smoke was first observed on August 20, 1955," and that "the barley was set afire" (Finding XII, Oral Opinion, Finding XVI, Tr. 20-23; Conclusion III, Tr. 33). Appellee's specification of error also goes to the reference to "fire" in Finding XIII, Tr. 30.

ARGUMENT IN REPLY TO APPELLANT'S BRIEF**1. Argument on Appellant's Specification of Error No. 2.**

The trial court properly found the carrier in privity and at fault for not properly protecting the barley, after the arrival of the ship at Seattle.

Appellant mistakes the basis of the trial court's decision.

The trial court convicted appellant of negligence in delaying unreasonably before acting for the protection of the cargo, after the arrival of the vessel in Seattle, under the circumstances existing and known to it at that time, or which in the exercise of due care, it could have learned.

Appellant's port captain Greenwood and surveyor Gow, upon whom he relied, had available to them, promptly on the vessel's arrival in Seattle, information which would indicate to any prudent person that prompt, immediate and emergency action was required for the protection of the cargo. Instead of acting they maintained a watch on the smoke detector, and continued to load cargo to the vessel including cargo to the hold in which the barley was stowed.

The Information Available to Greenwood on August 21

The trial court found appellant negligent and at fault for the damage to the barley, because its Port Captain, Greenwood, delayed unreasonably before acting to protect the barley shipment, when such action was required under the circumstances existing and known to him on August 21, or which in the exercise of due care, he should have learned (Finding XIII, Tr. 30-31).

Appellee has set forth in detail the information which the ship's officers had obtained by 9:00 A.M., August 21, when Wilmarth notified Greenwood that: "We have all the indications of a fire in number one lower hold" (Tr. 116). This evidence is summarized in this brief, *supra*, at pp. 5-8.

Greenwood did not learn smoke had been observed in the smoke detector cabinet, coming from No. 1 lower hold, although it had been reported to the Chief Officer and Master at 6:00 P.M. the preceding evening by the Second Officer, who observed that it increased during the night. He did not learn that smoke had been observed at the king post exhaust vent by the Chief Officer, who reported it to the Master, prior to the time Greenwood was called that morning. Although the smoke at the exhaust vent increased during August 21 (Tr. 152), he apparently did not observe smoke there, or at the detector cabinet.

Although Greenwood testified at trial that he inquired about the lights in the No. 1 lower hold on August 21, three weeks prior to trial he had not been sure that he learned they had been turned on in the barley cargo then or later. In any event, he did not report that information to Gow, upon whom he was relying to advise him and look after the carrier's interests, although he knew it was standard practice to remove fuses for cargo lights, because of the danger of fire.

Gow made no inquiry of the ship's officers, testified he saw no smoke on that date, and was not sure that the odor he detected in the pilothouse (where the Master did not detect an odor at any time) came from

the No. 1 lower hold, although the smoke detector was concentrated on the suction line from that compartment, the odor persisted, and Gow could not suggest any condition other than heating of the barley, which could have caused that odor.

In short, Greenwood was advised that the vessel had all the indications of a fire in the No. 1 lower hold, but he and Gow saw no evil, heard no evil, and thought no evil, on August 21.

Apparently content with that information, although he had no way of determining whether the barley cargo was heating (Tr. 234), Greenwood ordered no change in the vessel's loading schedule, and before protective action was begun, at 1:00 P.M. on August 22, additional cargo was loaded into the No. 1 hatch, over the barley (Findings IX, X, Tr. 28-29).

Action Finally Taken

Greenwood and Gow themselves testified in effect to the action which should have been taken promptly after Greenwood was notified of the emergency by Wilmarth, under the circumstances existing on August 21. They finally ordered that loading be stopped, and that the cargo over the barley in the No. 1 hatch be discharged at 1:00 P.M., August 22, acting on the basis of information that was available on the ship not later than 9:00 A.M., August 21, twenty-eight hours earlier, before the additional cargo had been loaded into the hatch.

The conditions which required the action taken at 1:00 P.M., August 22, existed at 9:00 A.M., August 21, and if the action taken by appellant on the later date was necessary and proper, as it contends, it was neces-

sary and proper promptly after the arrival of the vessel on August 21. Appellant delayed unreasonably in acting for the protection of the cargo, and the trial court was correct in so finding.

The Standard of Care

The standard of care to which appellant should be held has been defined in *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro*, 159 F.2d 661 (2d Cir.) cert. den. 331 U.S. 836, 67 S.Ct. 1519. In that case, the carrier claimed exoneration from liability for fire damage to cargo, under the Fire Statute, R.S. 4282, 46 U.S.C. § 182. During a voyage terminating at Brooklyn, flames had been observed in the vessel's reserve coal supply, stored in the cross-bunker, situated immediately aft of the No. 3 hatch, and separated from it by a thwartships wooden bulkhead. A cargo of castor beans was stowed in No. 3 hatch. Flames reappeared in the coal after the vessel reached Brooklyn, and the coal was first wetted and then discharged, the discharge being completed by midnight, December 31. At that time the limber boards in the cross-bunker, and the bulkhead between the bunker, and the No. 3 hatch were charred and burned.

The owners' port engineer, one Borges, had boarded the vessel on December 30, and inspected the coal bunker, but observed no flames at that time. He directed the discharge of the remaining coal. At 7:30 A.M., January 1, fire was reported in the castor beans, just forward of the thwartships bulkhead, caused by the fire in the coal. The trial judge exonerated the carrier, holding its Port Engineer, Borges, justified in believing that the cargo was not endangered, although the Mas-

ter had been negligent. Speaking of the duty imposed on Borges, the appellate court said:

"... it was his duty from what the master told him, and what he saw, not to accept the master's assumption that all was well, but to push inquiries home, to cross-examine the master, to examine the engine room logs, and in general to bestir himself until he had all the information that anyone on board had. . . . (the port engineer) was charged with providing for the safety of a cargo worth over half a million dollars; the necessary precautions were no more than to extract from those on board whatever they knew; . . . Indeed, he did think the fire important enough to go himself to the scene; and what he saw, coupled with what he should have learned, charged him with immediate action.

* * *

"The measure in such cases is not what the owner knows, but what he is charged with finding out. He may, if he will, put his ship at hazard and answer as he can to his underwriters, but to the cargo he must not be indifferent; he is relieved of his absolute liability at common-law only upon condition that he exercises care measured by the occasion." (159 F.2d at 664, 665)

This Court cited the foregoing decision with approval in *States Steamship Company v. United States*, 259 F. 2d 458, at 466 and 474.

In that decision, this Court denied limitation of liability because of the knowledge which the shipowner's port engineer had, and the knowledge which would have been available to him, in the exercise of ordinary care, concerning the crack sensitivity of the PENNSYLVANIA.

In its opinion on the Petition for Rehearing on Limi-

tation, this Court held that the "concept of liability" of the Limitation Act, and the Carriage of Goods by Sea Act was the same, that the shipowner is liable "*for all loss resulting from his failure to exercise effective control when he had the chance*" (quoting GILMORE and BLACK, *The Law of Admiralty* (1957) p. 696, italics by the court), 259 F.2d at 474. In the same footnote in which it quoted *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, supra*, as follows: "The measure in such cases is not what the owner knows, but what he is charged with finding out," the Court quoted with approval from *The Cleveco*, 154 F.2d 605, 613 (6th Cir.): "... knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it." 259 F.2d at 474, f.n. 6.

See also *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502, 510, 52 S.Ct. 450.

Measured by these standards, the carrier was clearly negligent and at fault, through its privy, Port Captain Greenwood, for cursory investigation, inaction, and delay. The trial court's finding cannot be reversed unless it was clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6.

Argument on Appellant's Specification of Error No. 1

The trial court found the fire was caused by negligence of the ship's officers and crew in the care and custody of the cargo, in the use of the cargo lights. It further found that the carrier was negligent and at fault, through its port captain, Greenwood, in not properly protecting the barley after the arrival of the ship at Seattle on August 21. It found such negligence was a proximate cause of the damage to the barley. Under these findings, it properly concluded the carrier was liable (Finding XIII, Tr. 30-31; Oral Opinion, Finding XVI, Tr. 20-23; Conclusion III, Tr. 33).

Appellant's Real Position

In its argument under its Specification of Error No. 1, at pages 19-22 of its brief, appellant cites statements from cases under the Fire Statute, 46 U.S.C. 182, holding, in general, that the statute is not to be construed grudgingly. That much is conceded.

But under the facts as found by the trial judge, appellant's position on this phase of the case is precisely this:

Once a fire has begun as a result of negligence of the ship's officers and crew, the carrier is immune from liability for cargo damage, even though it is negligent, and at fault and in privity, in not properly protecting the cargo, and such negligence is a proximate cause of the damage to cargo.

Trial Court's Conclusion Was Proper

Of course, no case, under either COGSA, or the Fire Statute, stands for the proposition which appellant

asks this Court to pronounce. *Earle & Stoddard v. Ellerman's Wilson Line*, 287 U.S. 419, 53 S.Ct. 200, cited by appellant, recognizes that immunity from liability under the Fire Statute is lost where the owner acts negligently, or negligently fails to see that action is taken where there is a duty to act (287 U.S. at 427).

“If the mere happening of damage through an excepted peril releases the carrier from responsibility to take due measures to care properly for the cargo, then that must be because the happening of the damage has somehow brought an end to the obligation imposed by Section 3(2),¹ and, once that inconsequent proposition is stated, it will find few supporters.” Gilmore and Black, *The Law of Admiralty* (1957) p. 149.

“ . . . where damage has happened, all measures which are reasonably available, under the circumstances, ought to be taken to arrest or check the further destruction or deterioration of the goods.

“And that is so whether the original cause of the mischief was or was not a peril for which the shipowner was responsible under the contract.” Carver on the Carriage of Goods by Sea (9th Ed. 1952)

In *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro*, 159 F.2d 661, the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, reversed a trial court decree granting exoneration to the shipowner, under the Fire Statute, because its Port Engineer was negligent in failing to act promptly for the protection of the cargo after the arrival of the ves-

¹The reference is to §3(2) of COGSA, 46 U.S.C. 1303(2): . . . “the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.”

sel in port, although the fire was not caused by any negligence with which the ship owner was in privity. The court stated:

"... it is not important whether some of the damage had been done before Borges failed in his duty; any more than whether such preceding damage may have been one of the causes for the fire in the stow. If the owner would free itself from liability for such damage the doctrine of *THE VALLESCURA* imposes upon it the hard burden of proving how much was not caused by the wrong, a burden whose discharge ordinarily carries such small hope of success that it may not care to make the attempt." (159 F.2d at 665)

The Supreme Court denied certiorari. 331 U.S. 836, 67 S.Ct. 1519.

Appellant cites this decision in another portion of its brief, p. 23, but does not attempt to distinguish it.

Schnell v. The Vallescura, 293 U.S. 296, 55 S.Ct. 194, holds that where damage to cargo results from two causes, and the carrier is liable for damage from one cause and excused for damage from the other cause, the burden of segregating the damage from each of the causes is on the carrier, and if it fails to segregate, it bears the whole loss. That is the law under COGSA. *Edmond Weil, Inc., v. American West African Line*, 147 F.2d 363 (2d Cir.).

In this case, the trial court found the carrier in privity, and at fault, and that such negligence was a proximate cause of the damage. Appellant made no effort to segregate, the damages have been assessed, and appellant assigns no error to the amount.

The trial court's conclusion was correct.

3. Argument on Appellant's Specification of Error No. 3

The carrier is not entitled to General Average contribution, because the damage resulted from a cause for which it was responsible, as the trial court found. Additionally, it is not entitled to General Average contribution, because it failed to exercise due diligence to make the *Oregon Mail* seaworthy at the commencement of the voyage.

The Carrier Was Responsible

Under the form of "Jason clause" in appellant's bill of lading, Ex. 6, Clause 10, quoted in part in Appellant's Brief, p. 30, the liability of cargo to contribute in General Average is conditioned on "... the event of accident, danger, damage or disaster, ... for which, or for the consequences of which, the carrier is not responsible. . . ." The trial court held the carrier responsible for the damage to cargo, and by the terms of the contract of carriage, the carrier is not entitled to General Average contribution. Since the matter is governed by contract, the fact that some expense would have been incurred if the carrier had not been negligent is legally irrelevant.

Carrier Failed to Exercise Due Diligence

If this Court reverses the trial court's decree, and holds the carrier not liable, appellant is nevertheless not entitled to recover a General Average contribution, because it failed to exercise due diligence to make the OREGON MAIL seaworthy at the commencement of the voyage.

Even if the carrier is excused from liability under COGSA, or the Fire Statute, it may not recover in General Average if the fire resulted from its failure to exercise due diligence to make the vessel seaworthy at the commencement of the voyage. *Globe & Rutgers Fire Insurance Co. v. United States*, 105 F.2d 160 (2d Cir.), cert. den. 308 U.S. 611, 60 S.Ct. 175. *Standard Oil Co. v. Anglo-Mexican Petroleum Corp.*, 112 F.Supp. 630 (S.D.N.Y.).

In this case, the carrier assumed the burden of showing that the fuses for the cargo lights in the No. 1 lower hold were removed prior to, or during, the loading of the barley. Its witnesses testified that such removal was standard practice in the American Merchant Marine, and good seamanship, to eliminate the hazard of fire, in compartments loaded with grain.

Appellant offered testimony that the fuses for this circuit were removed, and argued that they had been replaced after the vessel's departure from the port of loading, but produced no witnesses who could so testify.

The trial court properly refused to find that the fuses had been removed, and found instead that the lights were "... negligently turned on or permitted to remain burning after the loading of bulk barley into the No. 1 lower hold had commenced, . . . " (emphasis supplied) (Finding VII, Tr. 27).

The trial court did not find, and this Court should not find, that the carrier exercised due diligence to make the No. 1 lower hold seaworthy for the carriage of the barley. Appellant assigned no error to the quoted finding. The Cross-Libel was properly dismissed.

4. Argument on Appellant's Specification of Error No. 4

Appellant is not entitled to credit for special charges. No separate issue is presented under appellant's Specification of Error No. 4. If the carrier is liable for damage to cargo, it is not entitled to deduct from the salvage proceeds, expenses in connection with such salvage but must answer for the agreed value of the cargo. If it is not liable, and appellee is entitled only to the net salvage proceeds, then appellant is entitled to deduct expenses in the agreed amount of \$1490.84.

ARGUMENT ON APPELLEE'S SPECIFICATION OF ERROR

Appellant failed to sustain its burden of proving that the barley was damaged by a "fire" in the legal sense. The trial court's finding to that effect is without substantial support in the record, and cannot rest on its own evaluation of the appearance of Exhibit 2. The Court will not reach this point, however, unless it reverses the trial court on Appellant's Specifications of Error Nos. 1 or 2.

Damage Was by Heat Not Fire

The evidence did not establish that the barley was damaged by fire. The carrier had the burden of proving that the damage was occasioned by a cause for which it was not liable. *Schnell v. The Vallescura*, 293 U.S. 296, 55 S.Ct. 194. The same rule applies under the Fire Statute. *The Buckeye State*, 39 F.Supp. 344 (W.D.N.Y.)

The trial court's basic finding, in its Oral Opinion, Finding XVI, Tr. 20-23, and Finding XII, Tr. 29-30, indicates that it relied principally or entirely on the following evidence:

- (1) The appearance of Exhibit 2.
- (2) The emanations of smoke and the registration of smoke on the detection apparatus.
- (3) The great amount of heat in the crackling barley.

Two witnesses testified concerning samples of barley taken from the hold: Gow for appellant, and Smith, for appellee.

Gow testified that Exhibit 2, which he preserved and delivered to appellee's representatives, was representative of the most severely damaged barley aboard the vessel, and that he observed no barley which was more heavily charred or damaged (Tr. 207-208). In his experience as a marine surveyor, he had been concerned with twenty-five or thirty instances of fire damage to cargo and was familiar with the appearance and effect of fire as it related to the holds of steel vessels (Tr. 176), but he had never observed barley that he knew to have been damaged by heat, in the absence of flame or glow (Tr. 218) although he knew heat would damage a grain cargo (Tr. 215). He did not know what effect a temperature necessary to sustain a flame or glow would have on barley (Tr. 203-204). He supposed that flame or glow in barley would necessarily produce ash, but he observed no ash in any barley aboard the vessel, or taken from the vessel (Tr. 205-206). He could not state that the barley had reached any specific temperature at any time (Tr. 210). No effort was made to qualify him as an expert witness in the field of chemistry or physics. Nevertheless, he testified that his observation of the condition of the barley enabled him to form the conclusion that it had been on fire (Tr. 200).

Smith, a chemical engineer, testified that he had performed an experiment in which he heated identical barley, until it reached a temperature of 685° , and that the condition of this barley, introduced in evidence as Exhibit 4, was identical to Exhibit 2, the most severely damaged barley aboard the OREGON MAIL. He testified that that experiment, coupled with the shiny, tarry appearance of Exhibit 2, indicating the presence of substances which would have been reduced to pure chars if exposed to heat in excess of 800° , and the absence of ash, indicated to him that the barley had never degenerated from glowing or fire (Tr. 246-253).

Appellant introduced no contrary evidence.

Clearly, Gow's opinion, based on the appearance of the barley, is not substantial evidence in support of the trial court's reliance on the appearance of Exhibit 2.

If the trial court based its finding on its own evaluation of Exhibit 2, in the face of expert testimony to the contrary, its finding cannot be sustained. Neither a trial nor an appellate court may "judicially rely" on its own knowledge and skill, whether the issue be one of maritime affairs, or a technical issue, but must decide the case on the evidence before it. See *Hanover Fire Insurance Company v. Holcombe*, 223 F.2d 844 (5th Cir.), cert. den. 350 U.S. 895, 76 S.Ct. 154.

That smoke was observed over a long period of time, and that there was great heat in the crackling barley taken from the hold are undisputed, at least by appellee, but these facts neither compel nor permit a determination that the barley was on fire. Smith testified that water would be driven off the barley at 212° , and that

550° would produce both smoke and odors (Tr. 246, 252). No witness testified otherwise. No other witness testified to the temperature of the barley at any time, and only Gow, who did not know at what temperature barley would crackle, testified as to the significance of the crackling, and his testimony was that it was caused by the diffusion of CO₂ in the barley (Tr. 209).

The trial court did not refer to or rely on the opinions expressed by Tomlin and Wilmarth, based on the appearance of the electrical cable, and the painted metal surfaces of the hold, and that evidence does not furnish substantial support for the finding that there was a fire. Tomlin's testimony was, in essence, that the electrical cable in the No. 1 hold differed in appearance and feel from cable in good condition. He had no education or experience which would qualify him to distinguish between heat and fire damage. Wilmarth conceded that he had observed painted metal surfaces like those in the No. 1 lower hold similarly scorched and blackened by heat in the absence of flame.

The nature of the evidence which appellant produced bearing on the issue of fire adds significance to its failure to call the Fire Department personnel who were aboard the vessel on August 22, 23, and 25, and invites the conclusion that their testimony would have been unfavorable.

The Corn Cases

Two United States District Court admiralty decisions have passed upon the issue of whether grain damage resulted from heat or fire, where the evidence closely paralleled the evidence here. *The Buckeye State*, 39 F.

Supp. 344 (W.D.N.Y.) ; *Cargo Carriers v. Brown S. S. Co.*, 95 F.Supp. 288 (W.D.N.Y.). Each case involved the reduction of a grain cargo, corn, to a darkened and charred mass, and the evidence indicated a cargo light as the source of heat. In each case the court found the damage resulted from heat, not fire, and held the carrier liable.

In *The Buckeye State*, *supra*, the court quoted with approval from *Western Woolen Mill Co. v. Northern Assurance Co. of London*, 139 Fed. 637 (8th Cir. 1905), cert. den. 199 U.S. 608, 26 S.Ct. 750, 50 L.Ed. 331, as follows:

“ ‘Fire’ is caused by ignition or combustion, and it includes the idea of visible heat or light. ‘No definition of fire can be found that does not include the idea of visible heat or light, and this is also the popular meaning given to the word. * * * ’ ” (39 F. Supp. at 347)

The court continued: “Clearly damage may be done by ‘heat’ alone without ‘fire.’ ” The evidence in that case was that the damaged corn was a black charred mass in the area of the light fixtures; that vapor light globes were found partially melted and broken; and that the paint on the bulkheads, hatch coamings, and around the cargo lights was burned. Samples of corn from the vessel showed no ash. The court found there had been no fire, and held the libelant entitled to recover.

The evidence in *Cargo Carriers v. Brown S. S. Co.*, *supra*, was parallel to *The Buckeye State*, and this case, in that odor and/or smoke were first observed before the core of darkened and charred grain was uncovered. In addition, as here, grain was found adhering to a cargo

light. In that case actual flame did burst out when the damaged mass was uncovered. Nevertheless the court found the damage was caused by heat, and held the carrier liable.

In the absence of testimony that there was flame or glow, or that the temperatures reached would have produced flame or glow, the finding that there was a fire in the barley cannot be sustained. Under the evidence here the court should have found that the barley was damaged by heat, not fire. Its contrary finding is unsupported by substantial evidence and should be reversed if this Court reaches that issue.

CONCLUSION

The trial court properly found the carrier negligent and at fault, through Port Captain Greenwood, in delaying unreasonably before acting to protect the cargo, and held it liable for the damage proximately caused by such fault. Under well-recognized principles, where a loss results in part from a cause for which the carrier is liable, it has the burden of proving, if it can, that part of the loss for which it is not responsible.

General Average was properly denied because the carrier was responsible for the loss, and additionally because it failed to prove due diligence to make the vessel seaworthy at the commencement of the voyage.

If the trial court's finding that the carrier was at fault and in privity, and its conclusion that it was liable for the loss are not sustained, this Court must consider appellee's contention that the finding that the damage was caused by fire was erroneous, and without substantial support in the record, and affirm the decree, on the

ground that the damage was caused by heat, resulting from negligence of the carrier in the care and custody of the cargo.

Respectfully submitted,

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